Dated: July 10, 2013.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–69964; File No. S7–30–11]

RIN 3235–AL19

Retail Foreign Exchange Transactions

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting a rule to permit a registered broker-dealer to engage in a retail forex business, provided that the broker-dealer complies with the Securities Exchange Act of 1934, the rules and regulations thereunder, and the rules of the self-regulatory organization(s) of which the broker-dealer is a member insofar as they are applicable to retail forex transactions. The Commission is adopting Rule 15b12–1 substantially in the form previously adopted as an interim final temporary rule and is providing that the rule will expire on July 31, 2016.

DATES: This rule is effective from July 16, 2013 through July 31, 2016.

FOR FURTHER INFORMATION CONTACT: Catherine Moore, Senior Special Counsel; Shaheen Haji Zuver, Special Counsel; or Stephen J. Benham, Attorney-Adviser, at (202) 551–5550 or Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting Rule 15b12–1 under the Exchange Act, to permit a registered broker or dealer (''broker-dealer'') to engage in retail forex transactions, as such transactions are defined below. Unless the Commission acts further, the rule will expire and no longer be effective on July 31, 2016.

I. Background

A. Retail Foreign Exchange

The foreign currency exchange (''forex'') market is a large and liquid market used by banks, insurance companies, large corporations, and other large financial institutions to trade in risks associated with fluctuations in foreign currency rates. In recent years, a secondary off-exchange market for forex has developed for retail customers.[1] Many customers may view forex as a possible investment opportunity or portfolio risk management strategy. However, the Commission, its staff,[2] and other regulatory authorities [3] have cautioned investors that the forex market poses risks for retail customers.

The regulatory oversight of the retail forex market has developed primarily through a series of amendments to the Commodity Exchange Act (''CEA'').[4] Transactions commonly referred to as ''retail forex transactions'' are foreign exchange transactions with persons who are retail customers (persons who are not eligible contract participants (''ECPs'') as defined in the CEA) and that settle on a T+3 or greater timeline.[5] Significantly, certain types of transactions are not ''retail forex transactions'' under the CEA, even where one of the counterparties is a person that is not an ECP. These transactions include: (i) ''spot forex transactions'' where one currency is bought for another and the two currencies are exchanged within two days; (ii) forward contracts that create an enforceable obligation to make or take delivery, provided that each counterparty has the ability to deliver and accept delivery in connection with its line of business; and (iii) options that are executed or traded on a national securities exchange registered pursuant to section 6(a) of the Exchange Act.[6] In addition, and as discussed in more detail below, conversion trades—trades in which a foreign exchange transaction facilitates the settlement of a foreign security transaction—are spot forex transactions and, therefore, are outside the scope of the CEA prohibition and this rulemaking.[7]

Only certain regulated entities may act as counterparty to foreign exchange transactions.[8] These approved entities include Futures Commission Merchants (''FCMs''), Retail Foreign Exchange Dealers (''RFEDs'') registered with the CFTC, banks, and insurance companies, as well as broker-dealers registered with the Commission.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') further amended the CEA to limit potential abuses in the retail forex market by prohibiting retail forex transactions as of July 16, 2011, in the absence of a rulemaking permitting retail forex transactions by the relevant Federal regulatory agency. The prohibition in the CEA applies to retail forex transactions with registered broker-dealers, and the Commission adopted an Interim Final Temporary Rule on July 13, 2011 (''Interim Rule''), to allow retail forex transactions with broker-dealers under terms and conditions prescribed by the Commission.[9]

B. Amendments to the Commodity Exchange Act

As amended by the Dodd-Frank Act,[10] the CEA provides that a person for which there is a Federal regulatory agency,[11] including a broker-dealer registered under section 15(b) (except pursuant to paragraph (11) thereof) or 15C of the Exchange Act,[12] shall not enter into, or offer to enter into, a transaction described in section 2(c)(2)(B)(i)(I) of the CEA with a person who is not an ECP,[13] except pursuant to

[1] *See, e.g.,* FINRA Regulatory Notice 08–66 (Retail Foreign Currency Exchange) (November 2008) available at: *http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117362.pdf* (''FINRA Forex Notice'').

[2] *See Investor Bulletin: Foreign Currency Exchange (Forex) Trading for Individual Investors* (July 2011), available at *http://www.sec.gov/investor/alerts/forextrading.pdf* (''Forex Bulletin''). *See also Retail Foreign Exchange Transactions,* Exchange Act Release No. 64874 (July 13, 2011), 76 FR 41676 (July 15, 2011) (''2011 Interim Rule Release'') at 41677 (noting that media reports have highlighted potential abuses).

[3] *See, e.g.,* Press Release, Commodities Futures Trading Commission (''CFTC''), CFTC Releases Final Rules Regarding Retail Forex Transactions (Aug. 30, 2010) (available at *http://www.cftc.gov/PressRoom/PressReleases/pr5883-10.html?dbk*) (noting that retail forex is the largest area of retail fraud that the CFTC oversees).

[4] *See Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 3282 (Jan. 20, 2010) (''CFTC Proposing Release'') for a detailed discussion by the CFTC of the amendments to the CEA regarding retail forex.

[5] *See* 7 U.S.C. 2(c)(2)(B)(i).

[6] *See* 7 U.S.C. 2(c)(2)(B)(i)(I).

[7] *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security/Based Swap Agreement''; Mixed Swaps; Security/Based Swap Agreement Recordkeeping; Final Rule,* Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012) (''Products Definitions Release'').

[8] 7 U.S.C. 2(c)(2)(B)(i).

[9] *See* 2011 Interim Rule Release. *See also Extension of Interim Final Temporary Rule on Retail Foreign Exchange Transactions,* Exchange Act Release No. 67405 (July 11, 2012), 77 FR 41671 (July 16, 2012) (''2012 Extension Release'').

[10] 7 U.S.C. 2(c)(2)(E).

[11] 7 U.S.C. 2(c)(2)(E)(i), as amended by § 742(c) of the Dodd-Frank Act, defines a ''Federal regulatory agency'' to mean the CFTC, the Securities and Exchange Commission, an appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), the National Credit Union Association, and the Farm Credit Administration.

[12] 7 U.S.C. 2(c)(2)(B)(i)(II).

[13] ''Eligible contract participant'' is defined in CEA section 1a(18), as re-designated and amended by section 721 of the Dodd-Frank Act. *See* Public Law 111–203, § 721 (amending CEA section 1a). The CEA's definition of ECP generally comprises regulated persons; entities that meet a specified total asset test (*e.g.,* a corporation, partnership,

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a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe (''retail forex rule'').[14] An individual can qualify as an ECP if the individual has aggregate amounts invested on a discretionary basis of more than $10 million or more than $5 million if such individual enters into the transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred by such individual.[15] Transactions described in CEA section 2(c)(2)(B)(i)(I) include ''an agreement, contract, or transaction in foreign currency that . . . is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)).'' [16] A Federal regulatory agency's retail forex rule must treat all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I), similarly.[17] Any retail forex rule also must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation, and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.[18]

This amendment to the CEA took effect on July 16, 2011.[19] As of that date, broker-dealers, including broker-dealers also registered with the CFTC as FCMs (''BD–FCMs''),[20] for which the Commission is the Federal regulatory agency could no longer engage in retail forex transactions except pursuant to a rule adopted by the Commission.[21]

C. The Interim Rule

On July 13, 2011, the Commission adopted the Interim Rule (Rule 15b12–1T), which allows a registered broker-dealer to continue to engage in, or enter into, a retail forex business until July 16, 2012, provided that the broker-dealer complies with the Exchange Act, the rules and regulations thereunder, and the rules of the self-regulatory organization(s) (''SRO'') of which the broker-dealer is a member, insofar as they are applicable to retail forex transactions.[22] The Interim Rule was designed to provide an opportunity for the public to submit comments regarding broker-dealer practices in this area, which would inform the Commission's consideration of what additional rules may be necessary to address investor protection concerns, including abusive sales practices, volatility, and riskiness of the forex market as they affected the regulatory treatment of retail forex transactions by broker-dealers. We explained at the time that our action was also intended to preserve potentially beneficial market activity that, for example, may serve to minimize a retail customer's exposure to the risk of changes in foreign currency rates in connection with the customer's purchase or sale of a security. We also described potentially abusive practices, such as lack of disclosure about fees and forex pricing and insufficient capital or margin requirements, and requested comment on these practices and whether there are any steps we should take to seek to prevent them in the 2011 Interim Rule Release.[23] In July 2012, the Commission extended the Interim Rule to July 16, 2013.[24]

D. Interpretation Regarding ''Conversion Trades''

The Interim Rule was intended, in part, to address concerns that broker-dealers would be precluded from entering into foreign exchange transactions on behalf of retail customers in order to facilitate the customer's purchase or sale of a security listed on a foreign exchange and denominated in a foreign currency (''conversion trades'').[25] Subsequent to the initial adoption and most recent extension of the Interim Rule, in August 2012, the CFTC issued an interpretation in a joint rulemaking with the Commission that conversion trades are not a form of retail forex transaction subject to the prohibition under the CEA.[26] Under this interpretation, broker-dealers are permitted to engage in conversion trades without a rulemaking by the Commission and the level of broker-dealer foreign exchange activity subject to the prohibition in section 2(c)(2)(E)(ii)(I) of the CEA (and

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proprietorship, organization, trust, or other entity with total assets exceeding $10 million subject to certain restrictions) or an alternative monetary test coupled with a non-monetary component (*e.g.,* a corporation, partnership, proprietorship, organization, trust, or other entity with a net worth in excess of $1 million and enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business); certain employee benefit plans, the investment decisions of which are made by one of four enumerated types of regulated entities; and certain governmental entities and individuals that meet defined thresholds. The Commission and the CFTC adopted rules under the CEA that further define ''eligible contract participant'' with respect to transactions with major swap participants, swap dealers, major security-based swap participants, security-based swap dealers, and commodity pools. *See* Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012).

[14] 7 U.S.C. 2(c)(2)(E)(ii)(I). As used in this release, ''retail forex rule'' refers to any rule proposed or adopted by a Federal regulatory agency pursuant to section 742(c)(2) of the Dodd-Frank Act. On September 10, 2010, the CFTC adopted a retail forex rule for persons subject to its jurisdiction. *See Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 55410 (September 10, 2010) (''CFTC Final Rule''). The CFTC had proposed its rules regarding retail forex transactions prior to the enactment of the Dodd-Frank Act. *See* CFTC Proposing Release. The Federal Deposit Insurance Corporation (''FDIC''), the Office of the Comptroller of the Currency (''OCC''), and the Board of Governors of the Federal Reserve System (''Board'') have adopted similar rules. *See Retail Foreign Exchange Transactions,* 76 FR 40779 (July 12, 2011) (''FDIC Final Rule''); *Retail Foreign Exchange Transactions,* 76 FR 41375 (July 14, 2011) (''OCC Final Rule''); and *Retail Foreign Exchange Transactions,* 78 FR 21019 (April 9, 2013) (''Board Final Rule'').

[15] 7 U.S.C. 1a(18)(A)(xi).

[16] 7 U.S.C. 2(c)(2)(B)(i)(I).

[17] 7 U.S.C. 2(c)(2)(E)(iii)(II).

[18] 7 U.S.C. 2(c)(2)(E)(iii)(I).

[19] *See* Public Law 111–203, § 754.

[20] *See* 7 U.S.C. 2(c)(2)(B)(i)(II)(cc), 2(c)(2)(C)(i)(I)(aa) and 2(c)(2)(E). Congress expressly provided that the CFTC has jurisdiction over an FCM's retail foreign exchange activities only if the FCM is not also a registered broker-dealer.

[21] *See* 7 U.S.C. 2(c)(2)(B)(i)(II) and 7 U.S.C. 2(c)(2)(E)(ii)(I). This prohibition does not apply to (1) forex transactions with a customer who qualifies as an ECP, or (2) transactions that are spot forex contracts or forward forex contracts irrespective of whether the customer is an ECP. However, consistent with other Federal regulatory agencies' retail forex rules, Rule 15b12–1 applies to ''rolling spot'' transactions in foreign currency by broker-dealers. *See* section II.A. below for a description of rolling spot transactions.

[22] *See* 2011 Interim Rule Release.

[23] *See* 2011 Interim Rule Release at 41684. The Commission's Office of Investor Education and Advocacy published an Investor Bulletin providing information about retail forex investing, including information about the risks involved in that type of trading. *See* Forex Bulletin. The CFTC and the North American Securities Administrators Association also have published an alert regarding risks of fraud in foreign exchange markets. *See* Foreign Exchange Currency Fraud: CFTC/NASAA Investor Alert, available at *http://www.cftc.gov/ConsumerProtection/FraudAwarenessPrevention/ForeignCurrencyTrading/cftcnasaaforexalert.*

[24] *See* 2012 Extension Release.

[25] *See* Memorandum from P. Georgia Bullitt, Morgan Lewis, on Pershing LLC—Proposed Relief regarding transactions in Retail Foreign Exchange to James Brigagliano et al. (June 17, 2011) (available at *http://www.sec.gov/comments/other/other-initiatives/otherinitiatives-56.pdf*).

[26] *See* Products Definitions Release. For purposes of the interpretation, a conversion trade is a transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and (ii) the actual delivery of both the foreign currency and securities occurs by the deadline.

this rulemaking) is significantly reduced.

Although the CFTC interpretation excludes conversion trades from the definition of retail forex, hedging and speculative trading in foreign currency (other than bona fide spot transactions [27]) are still within the scope of the definition. Broker-dealers, including BD–FCMs, are therefore prohibited from engaging in such trades absent a Commission rule.

E. Comments

The Commission received 20 comments on the Interim Rule.[28] Sixteen comment letters were received on the Interim Rule after it was adopted in 2011. Four comment letters (from only two commenters) were received following the extension of the Interim Rule in 2012. To provide a broad overview of both investor and industry reaction to the Interim Rule, all of the comments received are addressed below.

Nine commenters asked the Commission to preserve their ability to engage in retail forex transactions.[29] Another group of commenters urged the Commission to adopt a final rule based on the approach followed in the Interim Rule.[30] These commenters maintained that it is in the best interest of retail customers to have the opportunity to conduct forex activity as part of their broader investing activity, through their broker-dealers, with the assistance of personnel with forex expertise.

One group of commenters limited their comments to conversion trades and, as discussed above, asked the CFTC and other Federal regulatory agencies (including the Commission), to take the view that conversion trades are not prohibited for purposes of section 2(c) of the CEA.[31] As noted above, the CFTC has issued an interpretation that conversion trades are not retail forex transactions subject to the prohibition under the CEA.

One commenter stated that the Commission should rescind the rule and allow the statutory ban to take effect or, in the alternative, limit the scope of the rule to a narrowly defined class of forex transactions, specifically hedging and the facilitation of settlement of foreign securities.[32] The commenter further stated that in initially adopting the Interim Rule, the Commission did not provide notice of and opportunity for comment on the rule, and did not include a concrete assessment or quantification of the need for the relief granted by the rule. As discussed throughout this release, the Commission does not believe it would be appropriate at this time to ban retail forex transactions or otherwise limit the scope of permissible transactions by broker-dealers. Such a ban or limitation may prohibit legitimate activities such as hedging or other transactions and, among other factors discussed below, the Commission has not obtained sufficient information to indicate that such restrictions are warranted. In addition, the final rule we are adopting today is being adopted after notice and comment in response to the 2011 Interim Rule Release and the 2012 Extension Release.

Three comment letters provided the Commission with data on retail forex activity. One of the commenters provided data, based on a sampling of five broker-dealers for an unknown year, showing that those members engaged in $550 million per month (principal) of over-the-counter currency forwards, currency options and rolling spot transactions with non-ECPs and $1.2 billion per month of conversion trades.[33]

The second comment letter provided data on the returns of retail forex accounts at certain FCMs and RFEDs, and offered suggestions for additional disclosure and business conduct requirements (such as suitability standards), and identified areas concerning regulation and market activities in the context of retail forex transactions that the commenter believed warrants further monitoring.[34] We agree with the commenter's suggestion that further monitoring of retail forex transactions is warranted. While the Commission has determined to adopt Rule 15b12–1 for the reasons discussed throughout this release, we believe it is appropriate to give additional consideration to the suggestions provided by the commenter. We are including in Rule 15b12–1 a provision providing that the rule will expire on July 31, 2016 to permit additional time for the Commission to assess the market for retail forex (including recent regulatory developments discussed below) and potentially develop more targeted rules for retail forex or to consider any rules that an SRO may propose regarding its members' retail forex activities. The commenter also suggested that currency exchange-traded funds (''currency ETFs'') would provide an alternative

[27] *See* Products Definitions Release at 48257. The Commission and the CFTC consider a foreign exchange transaction that is entered into solely to effect the purchase or sale of a foreign security to be a bona fide spot transaction where certain conditions are met.

[28] The comments are available at *http://www.sec.gov/comments/s7-30-11/s73011.shtml*.

[29] *See* email comments from Raul Gonzalez, dated July 17, 2011, James Peck, dated July 17, 2011, Bob Flowers, dated July 17, 2011, James M. Beatty, dated July 17, 2011, Angela Li, dated July 17, 2011, Mark A. McDonnell, dated July 21, 2011, Mark Smith, dated July 23, 2011, John Baur, dated July 27, 2011, and Ronald Covington, dated October 23, 2011.

[30] *See* Letter from Kenneth E. Bentsen, Jr., Executive Vice President Public Policy and Advocacy, SIFMA and Robert Pickel, Executive Vice Chairman, ISDA, to Elizabeth Murphy, Secretary, Commission, dated October 17, 2011 (''SIFMA/ISDA Letter''). *See also* Memorandum from SIFMA and ISDA to Marc Menchel, Gary Goldsholle, Matthew Vitek, Rudy Verra, Glen Garofalo, FINRA, dated February 23, 2012. These commenters requested that the Commission clarify that the Commission's rule, together with FINRA regulation, would exclusively govern the retail foreign exchange activity of all broker-dealers, including BD–FCMs. The Commission notes that the rule being adopted, Rule 15b12–1, by its terms applies in the context of retail forex transactions but does not alter the requirement to comply with applicable Commission rules or other rules in other contexts. These commenters also requested that the Commission, in consultation with the CFTC, provide a safe-harbor to broker-dealers that would apply in the event that the status of a customer that is a natural person (including their investment vehicles and family offices) changes from that of a retail customer when a foreign exchange transaction is first entered into with the broker-dealer, including a BD–FCM, to that of an ECP, because of fluctuations in net assets, a change in market prices or other factors. However, given that interpretations regarding what constitutes a retail forex transaction are under the CEA and therefore subject to the jurisdiction of the CFTC and not the Commission, these commenters may wish to consider addressing this request to the CFTC.

[31] *See* Letter from Phoebe A. Papageorgiou, Senior Counsel, American Bankers Association and James Kemp, Managing Director, Global Foreign Exchange Division, to Thomas J. Curry, Comptroller, OCC, Robert E. Feldman, Executive Secretary, FDIC, Jennifer J. Johnson, Secretary, the Board, David Stanwick, Secretary, CFTC, and Elizabeth Murphy, Secretary, Commission, dated April 18, 2012 (''ABA/GFMA Letter''). *See also* SIFMA/ISDA Letter. SIFMA and ISDA requested that the Commission amend the definition of ''retail forex business'' in section (a) of Rule 15b12–1T in order to make clear that conversion trade transactions would be permitted under the Interim Rule, which is no longer necessary as a result of the CFTC's interpretation.

[32] *See* Letter from Dennis M. Kelleher, President and CEO, and Stephen W. Hall, Securities Specialist, Better Markets, Inc. to Elizabeth Murphy, Secretary, Commission, dated September 12, 2011 (''Better Markets Letter''). We understand the commenter's reference to transactions entered into to facilitate the settlement of foreign securities to mean the conversion trades discussed above that are no longer subject to the statutory prohibition.

[33] *See* Letter from Kenneth E. Bentsen, Jr., Executive Vice President Public Policy and Advocacy, SIFMA, dated July 10, 2012 (''SIFMA Letter'').

[34] *See* Letter from Justin Hughes, CFA and Managing Member, Philadelphia Financial Management of San Francisco to Elizabeth Murphy, Secretary, Commission, dated August 2, 2011 (''Philadelphia Financial Letter''). The commenter's suggestions for additional regulation included limiting the product to only accredited investors, establishing order handling rules as well as limiting leverage and account churning.

means for effectively hedging against currency risk.[35]

A third comment letter from a representative of another commenter provided 2010 data from a small sampling of large broker-dealers with an estimated notional value of foreign exchange conversion trades of $13.55 billion and an estimated notional value of foreign exchange non-conversion trades of $1.43 billion, although these values included transactions with both ECPs and non-ECPs.[36]

Following the extension of the Interim Rule in July 2012, the Commission received four additional comment letters from two commenters.[37] One commenter requested that broker-dealers be allowed to continue to engage in, or enter into, a retail forex business. This commenter argued that broker-dealers should be permitted to conduct retail forex to offer their retail clients a full suite of investment options and to facilitate hedging of transactions in foreign stocks.[38] This commenter also noted that broker-dealers have risk management and customer suitability practices in place to monitor their activities not only in stocks but also in options and stated that retail forex activities should be able to be conducted within broker-dealers and subject to regulatory oversight by the Commission. In a separate communication, this commenter reiterated that the Commission should allow active trading and hedging of spot forex under the same guidelines as active trading of stocks and options.[39] The commenter asserted that brokers should be able to set their own margins, taking into account the currency, the client, and the market conditions.[40]

As noted above, and as discussed in more detail below, the Commission believes it is appropriate at this time to allow broker-dealers to continue engaging in retail forex transactions subject to existing restrictions under Commission and FINRA rules while any additional requirements for retail forex are considered in order to retain existing options for retail investors to access the foreign exchange markets. This approach is consistent with the approach contained in the Interim Rule and with the recommendations of most commenters; however, the Commission is adopting Rule 15b12–1 with a provision providing that the rule will expire on July 31, 2016. This provides an additional opportunity for the Commission to assess the market for retail forex and determine whether to issue more targeted rules for retail forex, to consider any rules that an SRO may develop regarding its members' retail forex activities, to consider whether to take action to extend the rule, or have the rule expire.

To that end, Commission staff will consult with FINRA periodically to discuss and obtain additional information about the retail forex marketplace, such as information regarding new FINRA member applications identifying retail forex business and any rules that FINRA may consider regarding its members' retail forex activities. Commission staff will also periodically consult with other regulatory agencies, including the CFTC and banking regulators, to discuss the retail forex marketplace and identify potential areas and instances of abuse, as well as the ways that retail investors have benefited or been harmed. In addition, the Commission will consider any relevant information obtained during standard broker-dealer examinations.

II. Discussion

Taking into consideration all of the comments received, the Commission believes it is appropriate at this time to allow broker-dealers to continue to engage in retail forex transactions subject to existing requirements under Commission and FINRA rules while any additional requirements for retail forex are considered in order to retain existing options for retail investors to access the foreign exchange markets.

The Commission is adopting Rule 15b12–1 with the same terms and conditions as the Interim Rule in order to permit broker-dealers to continue to engage in a retail forex business under the framework of the Exchange Act for the time period specified in the rule. The final rule requires that broker-dealers comply with existing obligations under the Exchange Act, the rules and regulations thereunder, and the rules of the SRO of which the broker-dealer is a member.[41] As discussed in more detail below, the final rule meets the requirements in Section 2(c)(2)(E)(iii) of the CEA that the rule treat all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I), similarly, and that the rule prescribes appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation by requiring that broker-dealers engaged in a retail forex business comply with the Exchange Act, the rules and regulations thereunder, and the rules of the SRO of which the broker-dealer is a member.[42]

The CFTC's interpretation regarding conversion trades that was issued following the extension of the Interim Rule has significantly narrowed the scope of retail forex transactions subject to a Commission rule. While we have only limited information on the level of retail forex activity conducted by broker-dealers, we received information from one commenter asserting that, based on a sampling of a small number of large broker-dealers, a substantial majority of foreign exchange transactions engaged in by these broker-dealers are conversion trades.[43] Given the clarification regarding the exclusion of conversion trades from the scope of retail forex transactions, we believe that the scope of transactions that are currently considered to be retail forex transactions, and thus subject to the Commission's rule, is much more limited than what the Commission anticipated in the Interim Rule.

Conversion trades were the focus of many of the comments received on the Interim Rule and the CFTC's interpretation was not issued until after the Commission had extended the interim temporary final rule. Given the recent modified scope of retail forex transactions to exclude conversion trades and the limited comments received on issues related to non-conversion trades, we believe it is appropriate to provide additional time for the Commission to focus its review on the current scope of activities that

[35] *See* Philadelphia Financial Letter. *See also* Better Markets Letter. *See also supra* section III.E. for a discussion of potential alternatives to retail forex transactions, including currency exchange traded products (''ETPs'').

[36] *See* letter from P. Georgia Bullitt, Michael A. Piracci and F. Mindy Lo, Morgan Lewis to Joseph Furey, Bonnie L. Gauch and Adam Yonce, Commission, dated July 28, 2011 (''Morgan Lewis Letter''). This commenter provided data from five large-broker dealers, but, only some of the broker-dealers provided information for every type of transaction cited in the letter.

[37] *See* email comments from Ernest J. Guevara III, dated November 16, 2012 (this comment does not appear to be related to the Interim Rule), and Brad Georges of Greeneye Management, dated December 19, 2012 (''Greeneye Comment Email'') February 28, 2013 (''Second Greeneye Comment Email''), and April 17, 2013.

[38] *See* Greeneye Comment Email.

[39] *See* Second Greeneye Comment Email.

[40] *See id.*

[41] Broker-dealers engaging in conversion trades are not subject to the rule as a result of the CFTC's interpretation to exclude conversion trades from retail forex, but they remain subject to the Commission's antifraud authority, including Section 10(b) and Rule 10b–5, under the Exchange Act when engaging in these trades.

[42] 7 U.S.C. 2(c)(2)(E)(iii).

[43] *See* Morgan Lewis letter.

are included in retail forex transactions prior to considering any tailored rules for broker-dealers engaging in a retail forex business.

The CFTC has also adopted rules that contain requirements specific to retail forex transactions including disclosure requirements, net capital requirements and haircut deductions depending on the currency pair, security deposit requirements and profitability reporting.[44] Moreover, other regulatory agencies[45] have also adopted rules that are similar to the CFTC's rule, including the Board which very recently adopted final rules related to retail forex transactions.[46] These new requirements may have an impact on the how the retail forex market functions. The rule the Commission is adopting today differs from the rules adopted by the CFTC and other regulatory agencies as it does not contain the specific requirements tailored to the retail forex transactions referenced above. While the Commission has determined to adopt Rule 15b12–1 for the reasons discussed throughout this release including the relatively limited level of retail forex activity engaged in by broker-dealers and the existing framework of legal obligations, including SRO rules applicable to broker-dealers, the Commission anticipates the three-year sunset provision will provide it with additional time to assess further the market for retail forex (including any changes based on recent regulatory actions) and consider whether to develop more targeted rules for retail forex, to consider any rules that an SRO may develop regarding its members' retail forex activities, to consider whether to take action to extend the rule, or have the rule expire.

With respect to SRO rules, the Commission notes that FINRA has previously proposed a rule to establish leverage limitations with respect to retail forex[47] and that the National Futures Association (NFA) has in place rules governing retail forex activities.[48] The Commission understands that FINRA plans to continue to consider rules related to retail forex transactions taking into account the regulatory framework developed by other regulators. The Commission expects to evaluate possible future actions during the sunset period in light of developments in the retail forex market, as well as the Commission's and SROs' experiences with retail forex activity pursuant to this rule.

The Commission has previously cautioned investors about risks in the foreign exchange market generally, and highlighted certain key risks for investors, including the lack of a central marketplace for retail forex, uncertainty about transaction costs, and the possibility for investors to lose more than their original investment.[49] Commission staff also has cautioned investors that many forex traders employ leverage as a means of amplifying their returns and higher leverage, in the form of a small margin requirement, can result in large losses if prices move in an unfavorable direction.[50] The Commission stated in the 2011 Interim Rule Release that insufficient capital or margin requirements could result in costs to the market associated with the inefficient provision of retail forex services.[51] Although no instances of abuse with respect to retail forex involving broker-dealers were raised in the comment letters,[52] the Commission remains concerned about risks in the retail forex market and the potential harm to investors if abusive practices, including misleading advertising or sales practices, are employed.[53] We are, however, mindful that retail forex transactions may be used for hedging and gaining direct exposures to the foreign currency markets, which may be appropriate for retail investors through broker-dealers with the protections available to investors under existing Commission and SRO oversight. We are also sensitive to the fact that the statutory prohibition applies to BD–FCMs in the absence of Commission rules but does not apply to FCMs that are not dually registered and are permitted to engage in retail forex transactions pursuant to the CFTC's rules. Accordingly, the failure to adopt a rule permitting BD–FCMs to continue to conduct retail forex could affect investors who have an account at a BD–FCM and would need to open a new account with a different intermediary in order to continue to conduct retail forex transactions.

The sunset provision for the expiration of the rule is designed to provide the Commission with a reasonable period of time to consider further whether additional requirements for broker-dealers engaging in a retail forex business may be appropriate while avoiding any disruption or unintended consequences to broker-dealers and their customers if the statutory prohibition were to go into effect. The Commission believes that a three-year sunset, as opposed to a shorter period, is appropriate because a shorter time frame may fail to provide adequate time to reflect on any developments in the retail forex market and then engage in any subsequent steps involved in any rulemaking process, such as the proposal and adoption of new rules before the expiration of Rule 15b12–1. Moreover, a longer time period may be unnecessary because the Commission should have sufficient time to consider and take any action prior to the expiration of the sunset provision. As an alternative, the Commission could adopt a final rule without a sunset provision or allow the temporary rule to lapse without adopting any final rule.[54] We believe, however, that in light of the CFTC's interpretation regarding conversion trades in the context of the retail forex market, as well as comments received both in support of and against final Commission rules to permit broker-dealers to engage in retail forex transactions, the arguments raised warrant further consideration. Although

[44] *See* CFTC Final Rule.

[45] *See* FDIC Final Rule, OCC Final Rule, and Board Final Rule.

[46] *See* Board Final Rule.

[47] FINRA proposed a rule in 2009 to establish a leverage limitation for retail forex. *See* Notice of Filing of Proposed Rule Change as Modified by Amendment No. 2 to Adopt FINRA Rule 2380 to Limit the Leverage Ratio Offered by Broker-Dealers for Certain Forex Transactions, Exchange Act Release No. 61090 (Dec. 1, 2009), 74 FR 64776 (Dec. 8, 2009).

[48] *See e.g.* NFA Compliance Rule 2–36. Requirements for Forex Transactions, NFA Compliance Rule 2–39. Soliciting, Introducing, or Managing Off-Exchange Retail Forex Transactions or Account, and NFA Financial Requirement Section 11. Forex Dealer Member Financial Requirements. The NFA rules that are relevant to retail forex transactions can be found at *http://www.nfa.futures.org/NFA-compliance/NFA-futures-commission-merchants/forex.HTML.*

[49] *See* 2011 Interim Rule Release at 41677, noting media reports of potentially abusive practices and concerns expressed by other regulators with respect to the retail forex practices of the entities they regulate. *See also* Forex Bulletin. Commission staff also cautioned investors that there had been allegations of fraud by the Commission and the CFTC in cases involving foreign exchange investment schemes. *Id.*

[50] *See* Forex Bulletin.

[51] *See* 2011 Interim Rule Release at 41684.

[52] The Better Markets Letter and Philadelphia Financial Letter refer generally to widespread abuses in the retail forex market, but do not cite specific instances of abuse involving intermediaries that are broker-dealers. *See* Better Markets Letter and Philadelphia Financial Letter.

[53] The Commission encourages any person who is aware of abusive practices or other misconduct in the retail forex market to report those activities to the Commission.

[54] One commenter stated that exchange listed currency ETFs, which as exchange-traded products are outside the scope of retail forex, provide an alternative to retail forex for hedging purposes and could give investors a greater return at a lower cost. *See* Philadelphia Financial Letter. *See also* the discussion of ETFs in the Economic Analysis section of this release. Other commenters, however, argue that investors should be allowed to engage in retail forex transactions with broker-dealers and that the current regulatory framework offers sufficient protections. *See* Greeneye Comment Email and SIFMA/ISDA Letter.

one commenter argued that Congress intended the ban on retail forex to go into effect,[55] we note that Congress specifically authorized the Commission and other Federal regulatory agencies to permit their regulated entities to engage in retail forex transactions by taking regulatory action the agencies determined was appropriate.[56] Furthermore, in addition to the Commission's Interim Rule, the CFTC and bank regulatory agencies have all adopted final rules to permit their regulated entities to engage in retail forex transactions.[57] The Commission will also consider any new information obtained with respect to the retail forex market, including any evidence of abusive practices or misconduct by BD–FCMs, prior to the expiration of the sunset period to determine whether additional limitations or action may be warranted. Any new requirements could be imposed either through Commission or SRO rules.

The rule we are adopting today, Rule 15b12–1, has the same terms and conditions as the Interim Rule that was adopted in 2011 and extended in 2012, except with respect to the expiration date of the rule as specified in paragraph (d) of the rule. Broker-dealers will continue to be required to comply with existing Exchange Act and SRO rules as they are applicable to retail forex transactions. We believe that the same reasons behind the adoption of the Interim Rule in 2011 and its extension in 2012 and discussed throughout this release continue to apply to the retail forex rule we are adopting today.[58]

A. Rule 15b12–1(a): Definitions

Rule 15b12–1(a) sets forth the definitions used in the rule,[59] which have not changed since the Commission adopted the Interim Rule in 2011.[60] Many of the definitions have the same meaning as in the Exchange Act.[61] These terms and definitions were selected because their meanings are readily understood in the industry. Other terms, such as ''retail forex business'' and ''retail forex transaction,'' are substantially similar to terms in the OCC, FDIC, and Board final rules.[62]

As we noted in the 2011 Interim Rule Release, the definition of retail forex transaction is based on the CEA and incorporates the terms described in CEA sections 2(c)(2)(B) and 2(c)(2)(C).[63] In addition, the definition is substantially the same as the definitions in the FDIC Final Rule, the OCC Final Rule, and the Board Final Rule.[64] Further, we noted in the 2011 Interim Rule Release that the definition of retail forex transaction has at least two important features. First, certain transactions in foreign currency are excluded from the definition, including spot transactions, contracts of sale that create an enforceable obligation to deliver between a buyer and seller that have the ability to deliver and accept delivery, respectively, in connection with their line of business, and forex transactions executed or traded on an exchange or designated contract market.[65] As we discussed previously, the exclusion for spot transactions was significantly expanded after the CFTC issued an interpretation, following the Commission's extension of the Interim Rule, that conversion trades are considered to be spot transactions and are therefore outside the scope of retail forex.[66]

The second important feature of the definition is that a ''rolling spot'' forex transaction (also known as a Zelener contract),[67] is not excluded from the definition as a spot transaction. Although a rolling spot forex transaction normally requires delivery of currency within two days, in practice these contracts are indefinitely renewed every other day and no currency is actually delivered until one party affirmatively closes out the position.[68] The Commission believes that a contract with a retail customer for a rolling spot forex transaction is economically more similar to a retail forex future, as described in CEA section 2(c)(2)(B)(i)(I), than a spot forex contract.[69] This interpretation is consistent with the approach of other Federal regulatory agencies acting pursuant to section 742 of the Dodd-Frank Act to treat all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I), similarly.[70]

The Commission received comments from two groups of commenters on the definitions included in section (a) suggesting that the Commission amend terms to clarify that conversion trades should not be regulated.[71] As discussed above, these comments both requested changes that are no longer necessary in light of the CFTC's interpretation regarding conversion trades.[72]

B. Rule 15b12–1(b): Broker-Dealers Engaged in a Retail Forex Business

Rule 15b12–1(b) requires that a broker-dealer comply with the Exchange Act, the rules and regulations thereunder, and the rules of the SROs of which the broker-dealer is a member, insofar as they are applicable to retail forex transactions.[73] These include rules related to the requirements of rules and regulations for retail forex in Section 2(c)(E)(iii)(I) of the CEA,[74] including but not limited to rules for disclosure, recordkeeping (or documentation), capital and margin, reporting, and business conduct.[75] The Commission initially adopted this section (b) in the same form in 2011 and the rationale for our adoption of this section has not changed.

Provided below are examples of obligations also discussed in the 2011 Interim Rule Release, including certain SRO requirements, relating to disclosure, recordkeeping (or documentation), capital and margin, reporting, and business conduct that are applicable to broker-dealers' retail forex transactions.

Disclosure Requirements

Broker-dealers that engage in a retail forex business must comply with the disclosure requirements in NASD Rule 2210.[76] NASD Rule 2210 requires all communications with the public by members of FINRA—including forex-related communications—to be based on

[55] *See* Better Markets Letter. Another commenter argued that retail forex transactions are essentially gambling and should be regulated and taxed as such. *See* Philadelphia Financial Letter.

[56] 7 U.S.C. 2(c)(2)(E)(ii)(I) and (iii)(I).

[57] *See supra* note 14. *See also supra* note 45.

[58] *See* 2011 Interim Rule Release at 41678 for a discussion of the rationale for adoption of the Interim Rule. *See also* 2012 Extension Release.

[59] Rule 15b12–1(a).

[60] *See* 2011 Interim Rule Release at 41678–79 for a discussion of these definitions.

[61] These include the definition of broker, dealer, person, registered broker or dealer, and self-regulatory organization. *See* 2011 Interim Rule Release at 41677.

[62] *See* 2011 Interim Rule Release at 41677–78 for a discussion of these definitions.

[63] 7 U.S.C. 2(c)(2)(B) and 7 U.S.C. 2(c)(2)(C).

[64] *See* FDIC Final Rule at 40781, OCC Final Rule at 41376–41377, and Board Final Rule at 21020–21021.

[65] *See* 2011 Interim Rule Release at 41678–79.

[66] *See supra* note 27.

[67] *See CFTC* v. *Zelener,* 373 F.3d 861 (7th Cir. 2004); *see also CFTC* v. *Erskine,* 512 F.3d 309 (6th Cir. 2008) (discussing Zelener contracts).

[68] *See* 2011 Interim Rule Release, note 34, at 41679. *See also* CFTC Proposing Release at 3284–3285 for a discussion of Zelener contracts and the CFTC's regulation of these contracts.

[69] *See* 2011 Interim Rule Release at 41679.

[70] *See supra* note 14.

[71] *See* SIFMA/ISDA Letter and ABA/GFMA Letter.

[72] *See supra* note 31.

[73] Rule 15b12–1(b).

[74] 7 U.S.C. 2(c)(2)(iii)(I).

[75] *See* 2011 Interim Rule Release at 41679–81 for a discussion of some of the Exchange Act and SRO rules that are applicable to broker-dealer retail forex transactions.

[76] *See* FINRA Forex Notice.

principles of fair dealing and good faith, to be fair and balanced, and to provide a sound basis for evaluating the facts regarding the market generally and a customer's specific transaction.[77] NASD Rule 2210 further prohibits broker-dealers from making ''any false, exaggerated, unwarranted, or misleading statement or claim in any communication with the public.''

Recordkeeping Requirements

Exchange Act Rules 17a–3 and 17a–4 require a broker-dealer to make, keep current, and preserve records regarding its business. For example, Exchange Act Rule 17a–3(a)(2) requires a broker-dealer to make and keep current a general ledger, which provides details relating to all assets, liabilities, income and expense and capital accounts, which could include entries related to retail forex.

Net Capital and Margin Requirements

Each broker-dealer must comply with Exchange Act Rule 15c3–1, which prescribes minimum regulatory net capital requirements for broker-dealers. The Commission notes that, under Exchange Act Rule 15c3–1(c)(2)(iv), any unsecured receivable arising from a retail forex transaction must be deducted when computing the broker-dealer's net capital.[78] The provisions of the net capital rule dealing with contractual commitment charges under Rule 15c3–1(c)(2)(viii) also apply to commitments with respect to foreign currency. Generally, broker-dealer margin requirements are set by Regulation T[79] and SRO rules.[80]

Reporting Requirements

A broker-dealer is required to file with the Commission periodic financial and operational reports (*e.g.,* annual audited financial statements and periodic FOCUS Reports), as prescribed by Exchange Act Rule 17a–5, that may include relevant information regarding a broker-dealer's retail forex business, if any.[81] In addition, FINRA has advised its member firms that a broker-dealer's expansion of its business to include retail forex transactions constitutes a material change in business operations pursuant to NASD Rule 1017(a), and a broker-dealer must first apply for and receive approval from FINRA to conduct this activity.[82] Additionally, Exchange Act Rule 17a–8 requires a broker-dealer to report to the U.S. Treasury Department's Financial Crimes Enforcement Network certain enumerated types of transactions, including suspicious transactions in foreign currencies and foreign currency futures and options.[83]

Business Conduct Requirements

In the course of complying with certain Exchange Act requirements, rules and regulations thereunder, and SRO rules relating to business conduct, broker-dealers must address their retail forex business.[84] For example, FINRA Rule 2010 (formerly NASD Rule 2110), which requires broker-dealers, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade, applies to all of a broker-dealer's business, including its retail forex business.[85] FINRA has stated that to comply with FINRA Rule 2010, a member firm must adequately disclose to its retail customers that the firm is acting as a counterparty to a transaction, the risks associated with forex trading, and the risks and terms of leveraged trading.[86] Broker-dealers also need to address retail forex transactions in connection with the customer reserve bank account requirements under Exchange Act Rule 15c3–3. In calculating what amount, if any, a broker-dealer must deposit on behalf of its customers in a reserve bank account pursuant to Exchange Act Rule 15c3–3(e), the broker-dealer must use the formula set forth in Exchange Act Rule 15c3–3a.

As we noted in the Interim Rule Release, these examples are not inclusive of all regulatory requirements administered by the Commission that must be complied with by a broker-dealer engaging in a retail forex business.[87] The Commission does not intend to suggest that other provisions, rules and regulations, including antifraud provisions and SRO rules, may not apply to broker-dealers' retail forex business.

While the Commission did not receive any comments that directly addressed Rule 15b12–1(b), it received comments that set forth recommendations for potential regulations that could apply to broker-dealers' retail forex businesses.[88] As discussed above, the Commission believes it is appropriate to give additional consideration to the recommendations provided by all of the commenters and is adopting the rule to permit additional time for the Commission to assess the market for retail forex and potentially develop more targeted rules for retail forex and to consider any rules that an SRO may propose regarding its members' retail forex activities.

C. Rule 15b12–1(c): Broker-Dealers Deemed To Be Acting Pursuant to a Commission Rule

Rule 15b12–1(c) provides that any registered broker or dealer that engages in a retail forex business in compliance with paragraph (b) of the rule on or after the effective date of the rule will be deemed, until the expiration date specified in paragraph (d) of the rule, to be acting pursuant to a rule or regulation described in CEA section 2(c)(2)(E)(ii)(I), as amended by section 742 of the Dodd-Frank Act.[89] The Commission adopted this section (c) in the same form in 2011 and did not receive any comments that addressed this section.

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[77] *See id.*

[78] 17 CFR 240.15c3–1(c)(2)(iv).

[79] 12 CFR 220.

[80] *See supra* note 47.

[81] Retail forex data may factor into a broker-dealer's financial reports; however, the presentation of such data on these reports would be aggregated with other financial data associated with the broker-dealer's activities and would not be specifically identified as relating to retail forex. *See, e.g.,* Form X–17A–5, 17 CFR 249.617. In addition, FINRA Rule 4524 requires broker-dealers to file supplemental FOCUS information, including information about commissions attributable to foreign exchange products in the supplemental statement of income (''SSOI'') and information about the gross amount of all foreign exchange forward transactions in the supplemental schedule for derivatives and other off-balance sheet items (''OBS''). *See* Exchange Act Release No. 66364 (February 9, 2012), 77 FR 8938 (February 15, 2012), and Exchange Act Release No. 68832 (February 5, 2013), 78 FR 9754 (February 11, 2013) (Commission orders approving the SSOI and OBS, respectively).

[82] *See* FINRA Forex Notice.

[83] *See* Exchange Act Release No. 18321 (Dec. 10, 1981); 46 FR 61454 (Dec. 17, 1981); *see also* FINRA Rule 3310 (formerly NASD Rule 3011) (requiring FINRA member firms to establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions). As FINRA noted, ''FINRA member firms engaging in retail forex activities should ensure their Anti-Money Laundering Program addresses the risks associated with the business and includes procedures for monitoring, detecting, and reporting suspicious transactions associated with their retail forex activities.'' *See* FINRA Forex Notice.

[84] The suitability requirement under FINRA Rule 2111 requires, in part, that a broker-dealer or associated person ''have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile.'' This requirement would generally not apply in the context of a retail forex transaction unless it is part of a recommended investment strategy that also involves a security.

[85] *See* FINRA Forex Notice.

[86] *Id.*

[87] *See* 2011 Interim Rule Release at 41681.

[88] *See* Philadelphia Financial Letter and Second Greeneye Comment Email. *See also supra* note 34.

[89] Rule 15b12–1(c).

D. Rule 15b12–1(d): Expiration

Rule 15b12–1(d) contains the expiration date of the rule.[90] The Commission is revising this paragraph of the rule to extend the expiration date to July 31, 2016. As discussed above, this revision to paragraph (d) will allow the rule to continue to apply while the Commission considers whether any additional requirements are necessary with respect to broker-dealer's retail forex activities. The Commission will also consider other possible alternative actions, including whether Rule 15b12–1 should be proposed, without a sunset provision, in its current form. The Commission will also consider whether the rule should be allowed to expire without further Commission action after the effective period ends.

III. Economic Analysis

A. Introduction

Section 3(f) of the Exchange Act requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation whenever it engages in rulemaking under the Exchange Act.[91] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[92] Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate to further the purposes of the Exchange Act.[93]

Many of the benefits and costs discussed below are difficult to quantify. For example, we believe that a key benefit to the adoption of Rule 15b12–1 is the prevention of inefficient disruptions in retail customers' access to foreign exchange markets. However, in the absence of current data on investor participation in the retail forex market, the magnitude of these inefficiencies is difficult to estimate. Specifically, if the alternative to conducting retail forex through a broker is to open an account with an FCM, then an estimate of the aggregate costs associated with the necessary account transfers would likely require information about the number of customer accounts that would be affected and the notional value of retail forex activity in those accounts.

Similarly, as discussed below, we recognize that investors who choose to use exchange-traded products to hedge currency risk will face the risk that a hedging instrument does not perfectly replicate the exposure to be hedged. While we might be able to estimate the quantity of basis risk for a particular position, a measure of the economic significance of this basis risk across the investor base to which a prohibition on retail forex would apply requires information about the foreign currency exposures that retail customers might seek to hedge. Although one comment letter provided some data on the scope of the market,[94] the Commission does not have sufficient data about retail forex participation to produce precise estimates of the aggregate economic effects of adopting Rule 15b12–1 and possible alternatives to this rulemaking. As a result, much of the discussion on costs and benefits that follows is qualitative in nature. However, where possible, the Commission has attempted to quantify some economic effects.

We understand that under the current regulatory regime, retail customers typically enter into foreign exchange transactions with broker-dealers for a number of reasons. Industry participants have informed us that the most common foreign exchange transactions are conversion trades, in which a currency trade is made in connection with a foreign securities transaction. These are excluded from the scope of retail forex transactions and thus from the Commission's rule as discussed above.[95] Based on data one commenter provided from a small sampling of larger broker-dealers, in terms of notional amount, foreign exchange conversion trades would account for approximately 90% of foreign exchange transactions conducted through broker-dealers, and 99% of all broker-dealer customer accounts are involved in conversion trades, though not all trades within an account may be conversion trades.[96] Commenters have also conveyed to us that retail customers often enter into forex transactions with broker-dealers as part of a hedging strategy. For instance, retail customers may engage in forex transactions through broker-dealers in order to hedge currency risk in securities or in a portfolio held in the customer's brokerage account. They may also engage in these transactions in order to obtain exposure to foreign markets as part of their overall investment strategy.[97]

Congress prohibited the retail forex transactions described in CEA section 2(c) except pursuant to rules adopted by the relevant Federal regulatory agencies allowing the transactions. As we noted in the 2011 Interim Rule Release, some of these transactions, such as hedging transactions may be beneficial to investors as they provide a mechanism for mitigating risks.[98] At the same time, the Commission is aware of potentially abusive practices that can occur in the retail forex market. Such practices may include, for example, misleading or lack of disclosure about fees and forex pricing, or misleading advertising directed to retail investors.[99]

As discussed above, on April 18, 2012, a group of commenters asked the CFTC to take the view that forex transactions that are solely incidental to, and are initiated for the sole purpose of, permitting a client to complete a transaction in a foreign security, through conversion trades would not be subject to the retail forex prohibition under section 2 of the CEA.[100] In August 2012, the CFTC issued an interpretation in a joint rulemaking with the Commission that clarifies that conversion trades are not retail forex transactions subject to the prohibition under the CEA. This interpretation permits broker-dealers to engage in conversion trades without a rulemaking by the Commission. It also significantly reduces the level of broker-dealer foreign exchange activity that is subject to the prohibition in section 2(c) of the CEA and thus to the final rule.[101]

Although the CFTC interpretation excludes conversion trades from the

[90] Rule 15b12–1(d).

[91] *See* 15 U.S.C. 78c(f).

[92] *See* 15 U.S.C. 78w(a)(2).

[93] *See id.*

[94] *See* Morgan Lewis Letter which provides some estimate on the overall scope of the retail forex market. *See also supra* section I.E. for a discussion of this comment letter.

[95] *See* Morgan Lewis Letter. As explained above, the ABA/GFMA Letter requested from the CFTC an interpretation that excluded conversion trades from the prohibition under CEA section 2.

[96] *See* Morgan Lewis Letter, which provided data from five large-broker dealers, but, only some of the broker-dealers provided information for every type of transaction that is cited in the letter. The data included a sampling of five large broker-dealer firms for forex data during the calendar year 2010 (or in one firm's case, June 2010 through June 2011) showing that the estimated aggregate notional value of conversion trades for the firms that provided data for the year was $13.55 billion while the estimated aggregate notional value of non-conversion trades was $1.43 billion. The data also showed that the estimated annual number of accounts involved in conversion trades for the time period was 17,600 and the number of non-conversion accounts was 187. *See id.*

[97] SIFMA/ISDA Letter at 4, Annex A at 1–2.

[98] *See* 2011 Interim Rule Release at 41684.

[99] *See id.*

[100] *See* ABA/GFMA Letter.

[101] This is in contrast to the estimated level of broker-dealer foreign exchange activity that was understood to exist when the Commission initially acted to adopt the Interim Rule in 2011 and when it extended the Interim Rule in 2012.

definition of retail forex, hedging and speculative trading in foreign currency (other than bona fide spot transactions) continue to fall within the scope of the definition. Broker-dealers and BD–FCMs are therefore prohibited from engaging in such retail forex activities absent a Commission rule allowing them to do so.

Adopting Rule 15b12–1 will maintain the regulatory framework that currently exists for broker-dealers under the Interim Rule, and will not create new regulatory obligations. Furthermore, the rule will preserve the ability of broker-dealers to provide, among other services, hedging to retail customers while the Commission considers what further steps to take, if any.

The Commission previously considered and discussed its economic analysis of Rule 15b12–1T.[102] When the Commission initially adopted the Interim Rule in 2011, we solicited comment on the economic analysis and received one comment that addressed the economic analysis.[103] We adopted Rule 15b12–1T on an interim final basis to allow the existing regulatory framework for retail forex transactions to continue for a defined period, to avoid potentially unintended consequences from broker-dealers immediately discontinuing their retail forex business, and to provide the Commission time to consider the appropriate regulatory framework regarding retail forex transactions.[104] Furthermore, parties who commented on the rule asked the Commission to preserve the ability of investors to engage in retail forex transactions through their broker-dealers.[105] In July 2012, the Commission extended the effective date of the Interim Rule to July 16, 2013 and received four comments (from two commenters) on the extension, none of which addressed the economic analysis in the 2012 Extension Release.[106]

B. Economic Baseline

The baseline for our economic analysis of the rule is the state of the retail forex market in existence today after the adoption of the Interim Rule and its extension, in which broker-dealers and BD–FCMs are permitted to conduct retail forex transactions in compliance with the existing federal securities laws and the rules of an SRO of which the broker-dealer or BD–FCM is a member. As is indicated in the discussion of economic effects and potential alternatives that follows, estimates of the economic impacts of this rule crucially depend on current participation in retail forex, both aggregate notional amounts and risk exposures to different foreign currencies. Broker-dealers are not required to report the foreign currency exposure of their retail clients and commenters did not provide data on the foreign currency exposure of their retail clients. Accordingly, the Commission only has limited data on the level of participation in the retail forex market. However, we have some information regarding the current size of the retail forex market and the use of foreign exchange instruments by retail investors from comment letters and other research.[107] In attempting to evaluate and confirm the estimates of the size of the broker-dealer retail forex market, which as noted above included conversion trades that now are excluded from the definition of retail forex, the Commission also looked at information from the Bank of International Settlements (BIS). This information indicates a recent increase in retail participation in forex markets.[108] Though BIS did not separately compute statistics for the subset of activity defined as retail forex by the CEA, nevertheless this may provide an indication of a general trend spanning both retail forex and foreign exchange transactions by retail customers that falls outside the definition of retail forex.

In addition, as mentioned above, one commenter provided data on participation in forex markets taken from a small sampling of large broker-dealers. According to this commenter, in terms of notional amount, foreign exchange conversion trades account for approximately 90% of all foreign exchange transactions (including transactions with both ECPs and non-ECPs) conducted by these broker-dealers.[109] This supports the premise that a large portion of foreign exchange activity flowing through broker-dealers falls outside of the scope of retail forex. Further, 99% of all broker-dealer customer accounts in this sample were involved in conversion trades. However, not all foreign exchange transactions engaged in by retail customers were conversion trades. The same commenter estimated transactions with a notional value of $550 million per month in currency forwards, options and rolling spot with non-ECPs.[110] Accordingly, while conversion trades might comprise the bulk of foreign exchange transactions engaged in by retail investors, their participation in other forms of foreign exchange transactions that fall within the scope of retail forex may be significant.

C. Benefits

Rule 15b12–1 is designed to preserve retail customers' access to the forex markets through broker-dealers and thus promote efficiency by, for example, permitting retail customers to continue to enter into forex transactions in connection with trades in foreign securities, as part of their brokerage activities until such time as Rule 15b12–1 expires by its terms or the Commission takes further regulatory action in this area. In the absence of Rule 15b12–1, broker-dealers would be required to exit certain types of retail forex business, which could require retail customers to engage in forex transactions through an FCM that is not dually registered as a broker-dealer or other service provider which could be economically inefficient.[111] In particular, to the extent that access to the forex markets through broker-dealers provides hedging opportunities for foreign investments, economic benefits may accrue to retail customers. Furthermore, by continuing to preserve a channel for broker-dealers' retail customers to access forex transactions through broker-dealers, the adoption of the final rule will continue to prevent any loss of competition in the retail forex market that could result if broker-dealers or BD–FCMs were required to exit the business. Adopting the rule also avoids potentially unintended consequences from broker-dealers immediately discontinuing their retail forex business, including costs or

[102] For a detailed description of the costs and benefits of Rule 15b12–1T, *see* 2011 Interim Rule Release at 41684.

[103] *See* Better Markets Letter.

[104] *See* 2011 Interim Rule Release at 41683. As noted above, as of the time the Commission adopted the Interim Rule and extended it, the CFTC had not issued its interpretation that conversation trades were not retail forex transactions.

[105] Fourteen of sixteen commenters were in favor of the rule and supported the ability of broker-dealers to conduct retail forex transactions. *See, e.g.* SIFMA/ISDA Letter.

[106] *See* supra note 37.

[107] *See e.g.* Morgan Lewis Letter and Philadelphia Financial Letter.

[108] *See* King, Michael and Dagfinn Rime. ''The $4 trillion question: What explains FX growth since the 2007 survey?'' BIS Quarterly Review, December, 2010 (attributing increased foreign exchange turnover to retail investor participation, facilitated by electronic execution platforms).

[109] *See* SIFMA Letter.

[110] *See id.*

[111] Establishing an account with an FCM may not bear a monetary cost, however, a deposit of several thousand dollars is frequently required to maintain an open account. A customer could experience increased costs from maintaining separate deposit minimums for securities and commodities accounts. In addition, other costs may also apply, such as resources associated with transferring accounts.

inefficiencies that may result if retail customers have to open new accounts with FCMs that are not BD–FCMs or with other entities in order to trade in retail forex or seek to trade in products that may perform as substitutes to retail forex, such as currency ETPs.

The adoption of the rule would not necessarily promote competition between broker-dealers and the other regulated intermediaries because broker-dealers would continue to offer retail forex services under Rule 15b12–1 which imposes requirements that already apply to broker-dealers under the existing regulatory regime, while other regulated entities were required to comply with new rules applicable to them. Further, all broker-dealers engaging in a retail forex business must comply with the final rule; therefore, competition among broker-dealers would most likely not be affected by adoption of the rule.

Adopting Rule 15b12–1 will impose no new burden on competition and should maintain competition among intermediaries. Under Rule 15b12–1T, regulatory requirements for broker-dealers operating in the retail forex market would remain unchanged. As a result, retail customers would continue to be able to choose between hedging their own portfolios of foreign securities in a securities account or relying on other intermediaries or products for hedging. Similarly, since the rule preserves the existing regulatory structure, the Commission does not expect that adopting the rule will result in any impact on efficiency or impairment of the capital formation process.

D. Costs

Because Rule 15b12–1 preserves the regulatory regime that had been in place prior to the effective date of Section 742(c) of the Dodd-Frank Act, the adoption of the rule imposes no new regulatory burdens beyond those that already existed for broker-dealers. The Commission recognizes that broker-dealers will face regulatory costs and requirements associated with operating in the retail forex market, but these are not new costs or requirements imposed by the rule.[112] As discussed above, the Commission is aware of potentially abusive practices that may occur in the retail forex market.[113] To the extent that such practices occur after adoption of this rule retail customers may bear the costs associated with these abuses.[114] The Commission notes that due to the CFTC's interpretation of the definition of retail forex,[115] the scope of retail forex transactions has narrowed significantly after the Commission adopted and extended the Interim Rule. As noted above, while the Commission only has limited information about the size of the retail forex market, we believe the scope of the retail forex market is much smaller than anticipated when the Commission adopted and extended the Interim Rule and that the number of transactions currently engaged in by broker-dealers, and therefore covered by a Commission retail forex rule, is much more limited.[116] The Commission believes, on balance, that the potential market disruption that may occur if the Commission does not adopt Rule 15b12–1 justifies the cost of maintaining the current regulatory regime while the Commission considers, during the time period set in the rule, whether further regulatory action is warranted.

E. Alternatives Considered

The Commission considered certain alternatives to adopting Rule 15b12–1. One alternative would be to allow Rule 15b12–1T to expire without adopting a final rule, and therefore preclude broker-dealers from engaging in a retail forex business, although they could continue to enter into conversion trades. A benefit of this alternative could be that certain abuses Congress sought to address through the prohibition in Section 742 of the Dodd-Frank Act could be addressed through a complete prohibition. The cost of this alternative would be that an outright prohibition on retail forex activity would interfere with certain business activities conducted by broker-dealers that are potentially beneficial for their customers, including hedging activities.[117]

A retail investor seeking to hedge currency risks in a portfolio would have to choose between alternative means of doing so. Trading in currency futures is one such alternative, but under this approach, retail customers of broker-dealers would be required to open an account with a FCM that is not dually registered as a broker-dealer. Moreover, mark-to-market margin requirements associated with futures contracts would expose hedging customers to additional cash flow risk. While shifting to services provided by a different intermediary would impose additional costs, retail customers could, however, potentially benefit from the protection of rules to which those intermediaries are subject.

In comment letters responding to the solicitation of comment in the 2011 Interim Rule Release, one commenter suggested another way for retail investors to obtain currency exposure is through ETPs.[118] Another commenter suggested that the Commission had not thoroughly analyzed the extent to which other products or trading strategies represent substitutes for retail forex.[119]

In response to the commenters' concerns, we noted in the 2012 Extension Release that currency ETPs are generally designed to provide broad exposure to exchange rate movements.[120] In this regard, the Commission notes that factors such as accrued interest or sponsor fees may cause an ETP to deviate from its benchmark. We also note that a market participant who uses ETPs as a hedging tool could face risks from executing hedges on an exchange that may be markedly different from the execution risk associated with transacting through a broker-dealer.[121] As such, and consistent with statements in the 2012 Extension Release, it does not appear that currency exchange-traded funds will necessarily function as effectively in mitigating the currency risk of particular securities transactions as retail forex.[122]

In the 2012 Extension Release, the Commission solicited specific comment on currency ETFs, including on the concerns raised in the comment letters received in response to the 2011 Interim Rule Release,[123] the benefits and costs

[112] These costs include costs related to disclosure, recordkeeping and documentation, capital and margin, reporting, and business conduct. A broker-dealer that currently engages in forex transactions with retail customers, for example, incurs costs associated with establishing, maintaining, and implementing policies and procedures to comply with regulatory requirements; preparing disclosure documents; establishing and maintaining forex-related business records; and preparing filings with the Commission, which may include legal and accounting fees. *See, e.g.,* 2011 Interim Rule Release at 41684.

[113] *See* 2011 Interim Rule Release at 41684.

[114] *See* Forex Bulletin.

[115] *See supra* note 26 and note 27.

[116] *See, e.g.,* Morgan Lewis Letter and SIFMA Letter. As noted by commenters and discussed above, most forex activity engaged in by retail customers is conversion trades and would no longer be subject to a Commission rule on retail forex.

[117] *See* 2011 Interim Rule Release at 41684.

[118] *See* Philadelphia Financial Letter. *See also* Better Markets Letter. As described above, the commenters referred to using currency ETFs. In the discussion here, the term ETPs is used to encompass a broader range of potential instruments (including ETFs) that may be used to gain exposure to forex.

[119] *See* Better Markets Letter.

[120] *See* 2012 Extension Release at 41675.

[121] *See, e.g.,* Kostovetsky, Leonard. ''Index mutual funds and exchange-traded funds.'' The Journal of Portfolio Management 29.4 (2003), while comparing ETFs to index funds, the author describes the different sources of tracking error incurred by ETF investors, including management fees and transaction costs in the form of bid-ask spreads.

[122] *Id.*

[123] *See supra* note 118.

to retail customers of using currency ETFs as a substitute for retail forex, and on the use of currency ETFs to hedge currency risk.[124] The Commission did not receive any comments in response to this solicitation of comment regarding currency ETFs, and the Commission continues to believe that ETPs represent an imperfect substitute for retail forex. In evaluating further the concerns expressed, however, Commission staff supplemented the analysis regarding the additional risks that investors who use ETPs as hedging instruments may have to bear discussed in the 2012 Extension Release and above.

Specifically, staff attempted to estimate the basis risk borne by an investor using an ETP to hedge EURUSD exposure.[125] While, on an annual basis, the average difference between ETP returns and EURUSD spot returns is small, the volatility of these differences from day-to-day is high, approximately 0.50% at a daily frequency. This volatility is indicative of the additional risk associated with hedging using ETPs, particularly for short holding periods or frequent rebalancing. Under Rule 15b12–1, the same investor could consider using a forward contract for EURUSD in her brokerage account. While the average difference in daily returns is higher in this case than with an ETP, due to the interest rate differential between Europe and the United States, the volatility of these differences is much lower, less than one basis point at a daily frequency.[126]

Finally, we note that if market participants prefer to transact in ETPs in order to obtain currency exposure, they may do so regardless of whether the Commission has or has not adopted rules for retail forex. In this regard, while the Commission continues to believe that ETPs have their own attendant risks, during the time Rule 15b12–1 is in place until its expiration date, the Commission will continue to evaluate the retail forex market, including alternative means of hedging currency risk and the availability of substitutes to retail forex. As such, as discussed throughout the release, the Commission believes that it is appropriate to allow broker dealers to continue engaging in retail forex transaction subject to existing requirements during that time.

If, as an alternative to the final rule, the Commission allowed the Interim Rule to expire, investors with international portfolios who are restricted from retail forex may choose to leave currency exposures unhedged. The risk of a portfolio of foreign securities that is not hedged, with returns computed in U.S. dollar terms, comprises (i) The risk of the underlying securities in local currency; (ii) the risk of the local currency relative to the U.S. dollar; and (iii) the correlation between the underlying security returns in local currency and currency returns. Allowing investors to hedge currency exposures removes components (ii) and (iii), leaving investors to bear only the risk associated with the underlying securities.[127]

Further, inefficiencies stemming from an inability to pursue currency hedging strategies in international portfolios, or higher costs of doing so, could cause investors to reduce their allocation to international investments. In the limit, investors may respond by exiting international markets. The resulting lack of diversification could represent a reduction in portfolio efficiency.[128]

The Commission also considered adopting Rule 15b12–1 without a sunset provision. While the direct costs and benefits of this alternative would be similar to those applicable under the rule being adopted (as it would simply continue the existing regulatory requirements for broker-dealers engaging in retail forex transactions), it nevertheless could limit the Commission's ability to fully consider, prior to issuing permanent rules, potential changes to the retail forex market; in part changes resulting from actions by other regulators that have recently adopted rules relating to retail forex that impose different requirements on market intermediaries than those the Commission imposes on broker-dealers under Rule 15b12–1. The Commission anticipates that it will reconsider the rule prior to its expiration in light of developments in the retail forex market during that time, as well as the Commission's and SROs' experiences with retail forex trading pursuant to this Rule.

F. Conclusion

The adoption of Rule 15b12–1 will not change the regulatory requirements for broker-dealers operating in the retail forex market. Similarly, the rule does not alter the existing regulatory structure. To the extent that potentially abusive practices continue in the retail forex market, the market will continue to bear the costs associated with any such abuses and the resultant inefficient provision of services across the market. The rule will continue to allow retail customers access to hedging transactions and other forex transactions through broker-dealers, without the need to shift business and open new accounts at other market intermediaries. If the Commission or an SRO imposes any additional burdens on retail forex transactions the new burdens will be considered in conjunction with those new rules.

IV. Other Matters

The Administrative Procedure Act generally requires that an agency publish a substantive rule in the **Federal Register** 30 days before it becomes effective.[129] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[130] The Commission notes that Rule 15b12–1 does not impose any new regulatory requirements on broker-dealers and that the rule is identical in substance to the Interim Rule, which requires that broker-dealers comply with existing Commission and SRO rules as they are applicable to retail forex transactions. A 30-day effective date is therefore not necessary for broker-dealers to prepare to comply with the rule. Furthermore, broker-dealers are currently permitted to engage in a retail forex business under

[124] *See* 2012 Extension Release at 41674.

[125] Commission staff chose EURUSD for its analysis due to ready availability of data on ETPs, equity indices and foreign exchange rates related to the Euro area, and because an ETP tracking EURUSD was more liquid than ETPs tracking other currencies during the sample period. As a result of the additional liquidity, Commission staff expects this ETP to result in less exposure to basis risk with respect to EURUSD than other ETPs in the same family constructed to track other currency pairs.

[126] Calculated based on data from *Daily/Monthly U.S. Stock Files* © 2012 Center for Research in Security Prices (CRSP), The University of Chicago Booth School of Business, and Thomson Reuters Datastream. To compute these statistics, Commission staff used daily WM Spot closing prices, short-term interest rates and prices for the CurrencyShares Euro ETN (ARCA: FXE) from 9/4/2007–12/31/2012 obtained from Datastream (interest rates and exchange rates) and CRSP (ETN returns). With these data, staff computed daily returns to (i) a EURUSD forward contract; and (ii) to the CurrencyShares Euro ETN. To compute the additional risk faced by a EURUSD hedger using each of these instruments, staff produced time series of the differences in daily returns and computed the average and standard deviations of these series.

[127] Based on data from Thomson Reuters Datastream, Commission staff used monthly returns for the period 9/4/2007–12/31/2012 to estimate the annualized risk and return for (i) the MSCI Europe index, unhedged in USD and (ii) the MSCI Europe index, hedged to USD. Staff chose these indices to simplify the computation of portfolio returns for various hedge ratios. Based solely on point estimates, partially-hedged portfolios offered higher total return per unit of risk.

[128] *See, e.g.,* French, Kenneth R. and James M. Poterba. ''Investor Diversification and International Equity Markets,'' American Economic Review, Vol. 81, No. 2, 1991, noting that large variation in expected returns across countries is required to justify lack of diversification in a mean-variance optimization setting.

[129] *See* 5 U.S.C. 553(d).

[130] *Id.* at 553(d)(3).

the Interim Rule. A gap in the effective dates of the Interim Rule and the final rule would cause the statutory prohibition to go into effect for a short period of time and could potentially create disruption and unintended consequences to broker-dealers and their customers.[131] For these reasons,[132] the Commission finds that there is good cause for making the rule effective earlier than 30 days after publication in the **Federal Register**.

V. Paperwork Reduction Act

The Commission notes that Rule 15b12–1 does not impose any new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA''),[133] nor does it create any new filing, reporting, recordkeeping, or disclosure reporting requirements for broker-dealers that are or plan to be engaged in a retail forex business. Accordingly, the Commission did not submit the rule to the Office of Management and Budget for review in accordance with the PRA.

In the 2011 Interim Rule Release and the 2012 Extension Release, the Commission requested comment on its conclusion that there are no collections of information in connection with the Interim Rule.[134] The Commission received no comments relating to the PRA analysis in the 2011 Interim Rule Release or the 2012 Extension Release.

VI. Regulatory Flexibility Act Certification

In the 2011 Interim Rule Release, the Commission certified that pursuant to 5 U.S.C. 605(b) the Interim Rule, which is substantively the same as Rule 15b12–1 (with the exception of the sunset date), will not have a significant economic impact on a substantial number of small entities. The Commission received no comments on the certification included in the 2011 Interim Rule Release. The Commission also made this certification in the 2012 Extension Release and the Commission received no comments on that certification. Like the Interim Rule, Rule 15b12–1 applies to broker-dealers that may engage in retail forex transactions. However, the rule does not impose new regulatory obligations, costs, or burdens on such broker-dealers. While the rule applies to broker-dealers that may be small businesses, any costs or regulatory burdens incurred as a result of the rule are the same as those incurred by small broker-dealers prior to the effective date of section 742 of the Dodd-Frank Act. Broker-dealers have already incurred those costs and regulatory burdens through establishing compliance with the rules adopted by the Commission under the Exchange Act applicable to broker-dealers, as well as relevant SRO rules. Further, the rule does not change the burdens on small broker-dealers relative to large broker-dealers. Accordingly, the rule will not have a significant economic impact on a substantial number of small entities.

VII. Statutory Authority and Text of Rule and Amendment

Pursuant to section 2(c)(2) of the Commodity Exchange Act, as well as the Exchange Act as amended, the Commission is adopting Exchange Act Rule 15b12–1.

List of Subjects in 17 CFR Part 240

Brokers, Consumer protection, Currency, Reporting and recordkeeping requirements.

In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II, of the Code of Federal Regulations as follows:

Text of the Rule and Amendment

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 et. seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

■ 2. Add § 240.15b12–1 to read as follows:

§ 240.15b12–1 Brokers or dealers engaged in a retail forex business.

(a) *Definitions.* In addition to the definitions in this section, the following terms have the same meaning as in the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.): ''broker,'' ''dealer,'' ''person,'' ''registered broker or dealer,'' and ''self-regulatory organization.''

(1) *Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

(2) *Retail forex business* means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

(3) *Retail forex transaction* means any account, agreement, contract or transaction in foreign currency that is offered or entered into by a broker or dealer with a person that is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)) and that is:

(i) A contract of sale of a commodity for future delivery or an option on such a contract;

(ii) An option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78(f)(a)); or

(iii) Offered, or entered into, on a leveraged or margined basis, or financed by a broker or dealer or any person acting in concert with the broker or dealer on a similar basis, other than:

(A) A security that is not a security futures product as defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(B) A contract of sale that:

(*1*) Results in actual delivery within two days; or

(*2*) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business.

(b) Any registered broker or dealer may engage in a retail forex business provided that such broker or dealer complies with the Act, the rules and regulations thereunder, and the rules of the self-regulatory organization(s) of which the broker or dealer is a member, including, but not limited to, the disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements, insofar as they are applicable to retail forex transactions.

(c) Any registered broker or dealer that is engaged in a retail forex business in compliance with paragraph (b) of this section on or after the effective date of this section shall be deemed to be acting pursuant to a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

(d) This section shall expire and no longer be effective on July 31, 2016.

Dated July 11, 2013.

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[131] *See, generally,* the discussion in section III.C. regarding the effect on retail customers if broker-dealers are not permitted to engage in retail forex transactions.

[132] The Commission also notes that, as discussed above, there have been some recent developments related to retail forex transactions, including the adoption in April 2013 of final rules by the Federal Reserve. *See* Board Final Rule (effective May 13, 2013).

[133] 44 U.S.C. 3501 *et seq.*

[134] *See* 2011 Interim Rule Release at 41683–84.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–17015 Filed 7–15–13; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket Nos. FDA–2011–C–0344 and FDA–2011–C–0463]

Listing of Color Additives Exempt From Certification; Reactive Blue 246 and Reactive Blue 247 Copolymers; Confirmation of Effective Date

Correction

In rule document 2013–15111, appearing on pages 37962–37963 in the issue of Tuesday, June 25, 2013, make the following correction:

On page 37962, in the section titled **SUPPLEMENTARY INFORMATION**, the first paragraph is corrected to read as set forth below:

In the **Federal Register** of April 1, 2013, we amended the color additive regulations in §§ 73.3100 and 73.3106 (21 CFR 73.3100 and 73.3106), respectively, to provide for the safe use of additional copolymers of 1,4-bis[(2-hydroxyethyl)amino]-9,10-anthracenedione bis(2-methyl-2-propenoic)ester (C.I. Reactive Blue 247) and additional copolymers of 1,4-bis[4-(2-methacryloxyethyl)phenylamino] anthraquinone (C.I. Reactive Blue 246), as color additives in contact lenses. We also corrected the nomenclature for Reactive Blue 247 by inserting ''2-methyl'' before ''2-propenoic.''

[FR Doc. C1–2013–15111 Filed 7–15–13; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 500

[Docket No. FDA–2013–N–0253]

Animal Feeds Contaminated With Salmonella Microorganisms

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; removal.

SUMMARY: The Food and Drug Administration (FDA or Agency) is revoking an advisory opinion on animal feeds contaminated with *Salmonella* microorganisms. This action is being taken because that advisory opinion is being superseded by the current FDA enforcement strategy articulated in a final compliance policy guide (CPG) on *Salmonella* in food for animals.

DATES: This rule is effective July 16, 2013.

FOR FURTHER INFORMATION CONTACT: Kim Young, Center for Veterinary Medicine (HFV–230), 7519 Standish Pl., MPN–4, Rm. 106, Rockville, MD 20855, 240–276–9207, *kim.young@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 15, 1967, (32 FR 4058), FDA issued an advisory opinion (the 1967 advisory opinion) codified at § 500.35 (21 CFR 500.35), which found that processed fish meal, poultry meal, meat meal, tankage, or other animal byproducts intended for use in animal feed may be contaminated with *Salmonella* bacteria, an organism pathogenic to man and animals. FDA found in the 1967 advisory opinion that contamination of these products may occur through inadequate heat treatment of the product during its processing or through recontamination of the heat-treated product during a time of improper storage or handling subsequent to processing. FDA also found in the 1967 advisory opinion that *Salmonella* contamination of such animal feeds having the potential for producing infection and disease in animals must be regarded as an adulterant within the meaning of section 402(a) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 342(a)).

FDA then articulated its intention to regard as adulterated within the meaning of section 402(a) of the FD&C Act shipments of the following when intended for animal feed and encountered in interstate commerce and found upon examination to be contaminated with *Salmonella* microorganisms: Bone meal, blood meal, crab meal, feather meal, fish meal, fish solubles, meat scraps, poultry meat meal, tankage, or other similar animal byproducts, or blended mixtures of these.

Elsewhere in this issue of the **Federal Register,** FDA announced a final guidance for FDA staff entitled ''Compliance Policy Guide Sec. 690.800 *Salmonella* in Food for Animals'' (the CPG), that revises the criteria FDA staff should consider in deciding whether to recommend seizure or import detention of an animal feed or feed ingredient due to adulteration resulting from contamination with *Salmonella*. Because the policy in the 1967 advisory opinion is being superseded by the CPG, the 1967 advisory opinion codified at 21 CFR 500.35 is hereby revoked.

FDA is removing § 500.35 without prior opportunity for comment in accordance with 21 CFR 10.85(g), which states ''An advisory opinion may be amended or revoked at any time after it has been issued. Notice of amendment or revocation will be given in the same manner as notice of the advisory opinion was originally given or in the **Federal Register**. . .'' As the advisory opinion at § 500.35 was published and codified on March 15, 1967, without prior opportunity for comment, this removal of § 500.35 is published in the **Federal Register** in the same manner.

List of Subjects in 21 CFR Part 500

Animal drugs, Animal feeds, Cancer, Labeling, Packaging and containers, Polychlorinated biphenyls (PCBs).

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 500 is amended as follows:

PART 500—GENERAL

■ 1. The authority citation for 21 CFR part 500 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 342, 343, 348, 351, 352, 353, 360b, 371, 379e.

§ 500.35 [Removed]

■ 2. Remove § 500.35.

Dated: July 10, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–16971 Filed 7–15–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–0403]

RIN 1625–AA08

Special Local Regulations; Marine Events; Annual Bayview Mackinac Race

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulation for the annual Bayview Mackinac Race, from 9 a.m. to 5 p.m. on July 20, 2013. This special local regulated is necessary to